IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 39, 293

JOSE MARIA GASTELUM-QUINONES, *Petitioner*,

v.

ROBERT F. KENNEDY, *Attorney General of the United States*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

DAVID REIN
JOSEPH FORER
FORER & REIN
711 14th Street, N. W.
Washington, D. C.
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. THE BOARD OF IMMIGRATION APPEALS WAS REQUIRED TO APPLY THE LAW OF THE CASE ESTABLISHED BY THE COURT OF APPEALS

In our main brief (pp. 17-22) we established two propositions: (1) Under the decision of the Court of Appeals in the original case, petitioner was entitled to offer evidence to show that he did not personally

espouse violent overthrow of the government; and (2) under the doctrine of the law of the case, this ruling was binding upon the Board of Immigration Appeals and the District Court. It followed, therefore, that if both these propositions are sound, the Board of Immigration Appeals erred in rejecting petitioner's motion to reopen. The government makes no clear response to either of these propositions.

A. The Meaning of the First Decision of the Court of Appeals

In response to our demonstration as to the meaning of the first decision of the Court of Appeals, the government makes several arguments, all either erroneous or irrelevant.

(1) It argues first at some length (pp. 17-25) that under the decisions of this Court, the evidence proffered by the petitioner in his motion to reopen was irrelevant. But this proves only that the Court of Appeals ruling was inconsistent with the decisions of this Court. It was hardly necessary for the government to argue at such length a proposition which we not only conceded, but asserted repeatedly throughout our brief (see pp. 8, 9, 10, 20, 21, 22, 23). The issue here, however, is what the law of the case was as established by the decision of the Court of Appeals, not whether that decision was correct.

(2) Secondly, the government argues (pp. 26-27) that the opinion of the Court of Appeals "is not entirely clear." It points, however, to no lack of clarity in the opinion itself, but shows only what has already been demonstrated and conceded, i.e., that the opinion is clearly erroneous since it is inconsistent with the opinions of this Court. The excerpts set forth in our

brief (pp. 17-18) demonstrate that the opinion, although erroneous, is crystal clear.

(3) Thirdly, according to the government (pp. 27-28), it must be assumed that the Board of Immigration Appeals correctly applied the ruling of the Court of Appeals, since its decision was affirmed by the Court of Appeals. But the BIA refused to follow the reasoning of the Court of Appeals that deportability rested on a statutory presumption of espousal of unlawful overthrow which was rebuttable, on the ground that to do so would be in conflict with the decisions of this Court. In affirming the BIA ruling, the Court of Appeals did not express agreement with the BIA's treatment of its opinion. Even under the government's view the opinion was "not entirely clear" and hence called for, at the minimum, clarification. The Court of Appeals, however, when faced with the impossible task of reconciling its prior decision with the action of the BIA, simply washed its hands of the matter, deciding the new appeals summarily and without explanation. Its conduct does not justify an inference that it had abandoned its earlier erroneous reasoning, or that it approved of the BIA's interpretation of its opinion. Its affirmance shows only that it affirmed without any reasoning. If an inference is to be drawn, the fair one is that the Court, although resolving to affirm, found it impossible, in the light of its earlier decision, to articulate the rationale for its action.

(4) The government suggests (p. 26, fn. 5) that, in any event, the Court of Appeals decision should not be binding on the government. It argues that "since the government prevailed on that appeal, it could not seek review in this Court." It is true that the

erroneous legal analysis upon which the court based its original decision was original with the court and was in no way induced by the government. But the government's role thereafter was not that of a mere innocent bystander. As the government notes in its brief (p. 10), petitioner immediately brought to the attention of the court the fact that its decision was based on erroneous legal premises, and requested a rehearing on that ground. It would have been entirely appropriate for the government at that stage to inform the court that although, in the government's view, it had reached the correct result, the reasoning it had employed was unsound and in conflict with the decisions of this Court. Indeed, the government should properly have been more concerned to have the Court of Appeals enunciate and apply the correct rule of law, rather than to have petitioner deported on an erroneous theory.

Again, when petitioner applied to this Court for certiorari in No. 711, October Term, 1960, it would have been entirely appropriate for the government to state that it considered the ruling of the Court of Appeals correct as to result but at the same time to advise the Court that the legal theory of the appellate court was erroneous. Instead it erroneously represented (p. 7, Gov. Opp. in No. 711, Oct. Term, 1960) that the decision of the appellate court involved only an "evaluation of testimony," and not the formulation of a novel legal theory.

Finally, in this litigation it was still open for the government to state to the appellate court that its prior decision was correct in result although wrong in theory. Instead it successfully urged the court to adopt the course it did take, i.e., to affirm the deporta-

tion order without examining the validity of its prior ruling. This zeal to deport the petitioner regardless of the soundness of the underlying legal theory does not reflect credit on the government. And as we shall show (*infra*, pp. 6-8), the same zeal leads the government to urge petitioner's deportation on the basis of alleged facts neither found by the BIA nor justified by the record.

B. The Law of the Case Was Binding on the Board of Immigration Appeals

On this score, the government argues (pp. 25-26) that, since the Court of Appeals' decision was erroneous and in conflict with the decisions of this Court, it was not controlling on the BIA. However, it cites no authority for this proposition except to quote, out of context, a paragraph from our brief stating that the law of the case rule is not binding on the appellate court that originally decided the case. There is no question, however, that the law of the case rule is binding on all lower tribunals (see authorities cited in our main brief, p. 19), regardless of the correctness of the ruling. Indeed, it would be impossible to have an orderly system of law, if a lower tribunal were bound by the decision of a higher court only whn the lower tribunal agreed with that decision.

Unlike the lower tribunal, the appellate tribunal has the option of either following the law of the case as set by its previous decision, or discarding its prior ruling and reexamining the case anew. But the Court of Appeals here took neither of these only two permissible courses.

II. PETITIONER IS NOT DEPORTABLE BECAUSE THE SERVICE FAILED TO PROVE THAT HIS MEMBERSHIP IN THE COMMUNIST PARTY WAS A "MEANINGFUL ASSOCIATION" OR "ACTIVE"

The government contends (pp. 28-34) that in any event, the record will support a finding of meaningful membership by the petitioner within the doctrine of the *Rowoldt* case. It argues (pp. 29-30) that this Court should not "reassess administrative findings which have been carefully considered by the lower courts." But it is the government that quarrels with the findings of fact made by the BIA, not we. The BIA found only that petitioner attended some meetings and paid dues.[1] We argued (pp. 24-27) that this alone does not satisfy the requirement of meaningful association established by *Rowoldt* and still less the standard of "active" membership as later established by *Scales*. The government does not dispute this as a proposition of law. It argues instead that the facts show more and lists (pp. 32-33) the facts that it considers crucial to distinguish petitioner's case from that of Rowoldt's. But none of these factual findings relied on by the government were made by the BIA. Thus the Board *did not find:*

(1) That petitioner was an "active" member of the Party.

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[1] It is true that the Board found that the evidence established "meaningful membership" (R. 14). This was not a finding of fact, however. It was a conclusion of law which the Board derived from its factual findings; i.e., in the Board's view attending some meetings and paying dues was sufficient to satisfy the *Rowoldt* requirement.

(2) That he had been a "regular" member of the Party from early 1949 until 1951.[2]

(3) That petitioner attended "numerous closed meetings" of his Party unit. The Board found only that petitioner attended meetings.[3]

(4) That petitioner had attended a Party convention.[4]

(5) That petitioner had attended a Party executive meeting.[5]

[2] Contrary to the assertion of the government, the BIA did not credit the testimony of two witnesses. It credited only the witness Scarletto, considering the witness Elorriaga to be merely corroborative (R. 4, 6). Scarletto testified that petitioner "just went once in a while" to Party meetings (R. 64).

[3] Scarletto testified that his Communist Party club met regularly once a week at the home of a different member of the club (R. 61-62). Nevertheless, over the two year period, Scarletto could only recall seeing the petitioner at "several" of those meetings — "it could be 15, 16 times" but he could not recall (R. 74). No meetings were ever held at petitioner's home (R. 65).

As stated by the BIA (R. 4), Elorriaga testified at one point in his testimony that he had seen petitioner at about 3 or 4 meetings a month over a three year period. At another point he testified that he had seen the petitioner only at 2 or 3 meetings in toto. The BIA said it would not resolve the conflict but would "regard Elorriaga's testimony as corroborative" only.

[4] The BIA's refusal to make such a finding is probably accounted for by the following testimony of Scarletto (R. 66):

"Q. Do you know whether Joe Gastelum ever attended any such [Party] convention?

"A. I saw him at one convention one time."

"Q. Do you know whether he was there on [sic] an official capacity?

"A. No."

[5] The government's record reference for this alleged incident was to the testimony of the witness Elorriaga (R. 69). But the BIA did not credit the details of Elorriaga's testimony. It found him to be merely "corroborative."

In contrast to its reliance on these facts not found by the BIA, the government ignores entirely the crucial fact which the BIA did find—viz: "There was little development of the [petitioner's] awareness of the fact that he belonged to a political organization" (R. 8).

It is plain that the theory of the BIA was that it was sufficient to justify the petitioner's deportation if it found that petitioner had attended some Communist Party meetings and paid dues, and it found no more than that.* Since that was the basis for the Board's finding and the rationale for its conclusion that petitioner's membership was meaningful, that is the only basis upon which its decision can be defended here. It is not open for the government to argue here that the BIA could have made other findings of fact, and could have found deportability on a different theory. *Burlington Truck Lines, Inc., et al.* v. *United States, et al.*, 371 U.S. 156, 168-9.

As we noted in our main brief (p. 27) the BIA compensated for the lack of affirmative proof of meaningful membership by advancing the novel theory that proof of bare organizational membership shifted to the alien the burden of showing that his membership was not a meaningful association as required by *Rowoldt*. As a consequence of its abandonment of the rationale upon which the BIA rested its decision, the government makes no effort to defend

*In discussing the contradiction in Elorriaga's testimony, the Board expressly noted that it found it unnecessary to resolve the inconsistency, since, in its view, it made no difference whether petitioner attended only two meetings of the Communist Party over a period of years, or whether petitioner attended meetings regularly three or four times a month (R. 4).

this novel theory,[1] or to respond to our argument (pp. 27-32) that this theory is invalid.

There is nothing in this Court's opinion in *Niukkanen v. McAlexander*, 362 U.S. 390, that would justify petitioner's deportation. The Court, in a per curiam opinion, held that the alien was deportable on the basis of the findings made by the Court of Appeals below. According to the Court of Appeals, Niukkanen "actively participated in discussions . . . of the policies of the party and the circulation of [a] newspaper as a party organ"; Niukkanen "was not an ordinary member of the Communist Party, but belonged to what members of the party called the 'top fraction'"; he "actively participated in party councils, and was considered to be in a relatively high regional echelon of the party," 265 F. 2d 825, at 828-9. Thus in both *Galvan v. Press*, 347 U.S. 522, and in *Niukkanen*, the Court held aliens deportable on the basis of records which showed their activity in the Party to be much greater than that of the alien in *Rowoldt*, and hence a "meaningful association." But neither case will support the deportation of the petitioner, whose activity in the Party was less than that of Rowoldt.

Respectfully submitted,

DAVID REIN
JOSEPH FORER
FORER & REIN
711 14th Street, N. W.
Washington, D. C.
Attorneys for Petitioner

[1] The government states (Br. 35): "we are not suggesting that petitioner had the burden of proof to show that he was not deportable."